(9)

No. 95-1340

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

HUGHES AIRCRAFT COMPANY,

Petitioner,

v.

UNITED STATES EX REL. WILLIAM J. SCHUMER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether the 1986 amendments to the False Claims Act, which relaxed the restrictions on *qui tam* lawsuits, apply retroactively to actions challenging pre-1986 conduct.

2. Whether the False Claims Act permits employees of government contractors to file "parasitic" *qui tam* actions based on allegations disclosed by the Government in an audit or investigation.

3. Whether the False Claims Act imposes liability for alleged infractions of other statutes or regulations regardless of whether such infractions result in a "false claim" against the public fisc.

PARTIES TO THE PROCEEDING

Petitioner, Hughes Aircraft Company, was appellee/cross-appellant below. Respondent, William J. Schumer (litigating on behalf of the United States of America), was appellant/cross-appellee below.

Pursuant to this Court's Rule 29.6, petitioner notes that it is a wholly-owned subsidiary of HE Holdings, Inc., which is in turn a wholly-owned subsidiary of Hughes Electronics Corporation ("HEC"). HEC, in turn, is a wholly-owned subsidiary of General Motors Corporation, which has issued various classes of shares to the public. The earnings of HEC are used to calculate the earnings per share of General Motors Class H common stock (New York Stock Exchange: GMH).

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BRIEF FOR PETITIONER

INTRODUCTION

This case involves a statute, the False Claims Act ("FCA"), with an enforcement mechanism that is virtually unique in the U.S. Code. The Act makes those who knowingly submit a false claim to the Government liable to the Government, but provides for enforcement not only by the Executive Branch but also by private parties ("relators") acting on behalf and in the name of the United States. A successful relator is entitled to a portion of any monies recovered for the public fisc. Such private "*qui tam*" actions have roots in ancient English law predating the development of the investigatory and law-enforcement powers of the modern state. (The phrase "*qui tam*" is short for *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means "he who brings the action as much for the king as for himself.")

The FCA's *qui tam* provisions are hardly a recent innovation. To the contrary, they were first enacted in 1863, at the height of the Civil War, when the feeble enforcement resources of the Executive Branch proved incapable of ferreting out fraud by unscrupulous government contractors. *See* Act of March 2, 1863, ch. 67, 12 Stat. 696. Federal law enforcement at that time was virtually nonexistent; indeed, the Department of Justice was not established until 1870. Notwithstanding the rise of a vast federal investigatory and law-enforcement bureaucracy in the twentieth century, the FCA's *qui tam* provisions have survived to this day. Indeed, as part of a general overhaul of the FCA in 1986, Congress expanded the ability of *qui tam* relators to enforce the statute.

In its lengthy history, the FCA has been frequently construed by the courts. At least two fundamental points have long been clear. *First*, the Act's *qui tam* enforcement mechanism seeks to protect the public fisc by creating a monetary incentive for private citizens to expose fraud against the Government. The Act therefore authorizes *qui tam* actions by "whistleblowers" who bring to light previously-undisclosed fraud, but *not* "parasitic" actions by relators who simply leech onto allegations of wrongdoing *already disclosed* by the Government or the news media. *Second*, the Act does not create an all-purpose cause of action for any violation of a contract, regulation, or statute by a government contractor; rather, it proscribes only *false claims* against the public fisc. As a matter of language and logic, a "claim" is not "false" if it requests money to which the claimant is entitled.

The opinion below challenges both of these settled points. Before reaching either point, however, the Ninth Circuit erred by holding that this action is governed by the FCA as amended in 1986, even though the conduct at issue here occurred before those amendments. The court then proceeded to reach the startling conclusion that the 1986 FCA amendments authorize employees of government contractors to bring "parasitic" *qui tam* actions based on information disclosed by the Government

during an audit or investigation. Finally, the court declared that a wholly technical noncompliance with accounting disclosure regulations, incapable of causing any injury to the public fisc, could nonetheless give rise to FCA liability. These holdings extend the False Claims Act far beyond all reasonable bounds, and leave government contractors exposed to endless litigation and open-ended liability.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 63 F.3d 1512 (1995) and reprinted in the Appendix to the Petition for Certiorari ("Pet. App.") at 1a-31a.

The District Court's unpublished orders denying Hughes' motions for dismissal and summary judgment based on the Act's bar against "parasitic" suits are reprinted at J.A. 196 and Pet. App. 34a-35a, respectively. The District Court's unpublished order granting summary judgment on the merits and its findings of fact and conclusions of law are reprinted at Pet. App. 36a-64a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 22, 1995. Hughes filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc, which the Ninth Circuit denied on November 17, 1995. *See* Pet. App. at 32a-33a. Hughes also filed a timely motion to stay issuance of the mandate pending the filing of a petition for certiorari, which the Ninth Circuit granted on November 29, 1995. *See* J.A. at 197. Hughes filed its petition for certiorari on February 15, 1996. This Court granted certiorari on October 15, 1996. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

As amended in 1986, the False Claims Act provides in pertinent part:

> Any person who—(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval; (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government . . . is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person . . . .

31 U.S.C. § 3729(a)(1), (2).

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A).

Between 1982 and 1986, the analogous provisions of the False Claims Act provided:

> A person not a member of an armed force of the United States is liable to the United States Government for a civil penalty of $2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person, and the costs of the civil action, if the person—(1) knowingly presents, or causes to be presented, to an officer or employee of the Government or a member of an armed force a false or fraudulent claim for payment or approval; (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved.

31 U.S.C. § 3729(1), (2) (1982).

> Unless the Government proceeds with the action, the court shall dismiss an action brought by the person on discovering the action is based on evidence or information the Government had when the action was brought.

31 U.S.C. § 3730(b)(4) (1982).

STATEMENT OF THE CASE

A. The B-2 and F-15 Subcontracts

Petitioner Hughes Aircraft Company is in the business of developing and manufacturing aerospace and defense systems. Virtually all of its work is performed under contracts with, or subcontracts for the benefit of, the United States and foreign governments.

In December 1981, at the direction of the United States Air Force, the Northrop Corporation awarded Hughes a subcontract to design and develop a radar system for the B-2 ("Stealth") bomber that Northrop was then building under contract with the Air Force. *See* Pet. App. at 42a. Because the B-2 was an experimental aircraft, its development and production costs were difficult to predict. Accordingly, the subcontract (like the prime contract) provided for payment on a "cost-plus" basis: Northrop would reimburse Hughes for its costs plus a reasonable profit. *See id.* at 42a; J.A. at 29.

Several months later, the McDonnell Douglas Corporation awarded Hughes a subcontract to design and develop an upgraded radar system for the F-15 fighter aircraft that McDonnell Douglas was then building under contract with the Air Force. *See* Pet. App. at 43a-44a. In contrast to the B-2 agreement, the F-15 prime contract and subcontract provided for "fixed-price" compensation: McDonnell Douglas would

pay Hughes a set amount regardless of its costs. *See* J.A. at 29, 31.

As work on the two subcontracts progressed, it became apparent to the Air Force and Hughes that the projects overlapped in at least two material respects. *First*, both projects required the development of an advanced Radar Data Processor ("RDP") to identify and track other aircraft by analyzing target data. *See* Pet. App. at 44a-45a; *cf.* M. Skolnik, *Radar Handbook* at 1.5 (2d ed. 1990). *Second*, the radar of both aircraft called for an enhanced Analog Signal Converter ("ASC") to speed data processing by converting incoming radar signals from analog into digital format. *See* Pet. App. at 49a-50a, 52a; *cf. Radar Handbook* at 3.38-3.39.

Pursuant to proper accounting practices and federal regulation, *see* 32 C.F.R. § 15-201.4 (1982), Hughes was required to allocate the common costs of the RDP and ASC programs between the B-2 and F-15 subcontracts. Since 1978, Hughes had accomplished such allocations through "commonality agreements," internal memoranda specifying the allocation of common costs among multiple projects. *See* Pet. App. at 38a-39a; J.A. at 161. In December 1982, Hughes program managers signed a commonality agreement for the RDP project that allocated all initial development costs to the F-15 project and divided all subsequent upgrade costs evenly between the F-15 and B-2 programs. *See* Pet. App. at 46a. And in June 1983, Hughes program managers entered into a commonality agreement for the ASC project, providing that all common costs would be divided evenly between the F-15 and B-2 programs. *Id.* at 54a.[1]

[1] The Ninth Circuit incorrectly stated that Hughes charged all initial ASC development costs to the B-2 program. *See* Pet. App. at 3a. In fact, it is undisputed that Hughes allocated those costs evenly between the B-2 and F-15 programs. *See id.* at 54a-55a. (That is why, as the Government ultimately determined, Hughes' use of commonality accounting practices actually *saved* the Government money. *See infra* pp. 8-9.)

Hughes notified both the Air Force and Northrop of these commonality agreements, *see* Pet. App. at 47a-48a, 56a, and in 1984 filed with the Air Force a revised Cost Accounting Standards ("CAS") disclosure statement describing the accounting methods implemented in the agreements, *see id.* at 56a; J.A. at 16-19, 111. At the Government's request, Hughes later expanded the RDP and ASC commonality agreements to include yet another project—a radar upgrade for the F-14 fighter aircraft.[2]

B. The Government Audits

When, in the mid-1980s, the B-2 program began to experience a significant growth in costs, officials at Northrop expressed concern that Hughes might improperly have used its commonality accounting practices to shift costs from the fixed-price F-15 subcontract to the cost-plus B-2 subcontract. *See* J.A. at 23-27, 141. Accordingly, Northrop requested a government audit of Hughes' accounting practices. *See id.* at 20-22.

Pursuant to that request, the Government launched an investigation into Hughes' allocation of costs pursuant to the RDP and ASC commonality agreements. *See* J.A. at 30. After discussing the matter with employees of both Hughes and Northrop, *see id.*, the Air Force prepared a preliminary, classified audit in June 1986 concluding that Hughes had

[2] In June 1984, at the direction of the United States Navy, the Grumman Aerospace Corporation awarded Hughes a subcontract to develop the radar system for an upgraded F-14 fighter known as the F-14D, and (again at the Navy's request) Hughes incorporated the advanced RDP and ASC technology into the F-14D. *See* Pet. App. at 56a-57a. Because the initial development phase of the RDP project had already ended, the revised RDP commonality agreement allocated common improvement and upgrade costs equally among the B-2, F-15, and F-14D programs. *See id.* at 58a-59a. The revised ASC commonality agreement specified that initial development costs would continue to be charged to only the B-2 and F-15 programs, while the costs of subsequent common upgrades would be divided evenly between all three programs. *See id.*

improperly billed the B-2 program for RDP and ASC development costs that should have been charged solely to the F-15 program. *See id.* at 29-32. The Defense Contract Audit Agency ("DCAA") then prepared a series of further unclassified audit reports from October 1986 to September 1988 challenging Hughes' allocation of the RDP and ASC costs. *See id.* at 33-38, 39-42, 59-65. In December 1987, the Government notified Hughes that it was directing Northrop to withhold $11.6 million under the B-2 subcontract as a result of the alleged accounting irregularities. *See id.* at 43-44.[3]

In addition to challenging Hughes' accounting practices, the DCAA auditors also challenged Hughes' *disclosure* of those accounting practices. *See* J.A. at 55-56, 62-63, 110-11. In particular, the final DCAA audit report concluded that the CAS disclosure statement that Hughes submitted to the Government did not adequately disclose the company's commonality accounting practices. *See id.* at 62-63.

During the investigatory process, government auditors met on numerous occasions with Hughes employees to discuss the alleged accounting improprieties. *See* J.A. at 64, 106-07, 159-60, 163, 169, 170, 172. The employees read and discussed the government audit reports, *see id.* at 161, 166, 172-74, and responded to the Government's inquiries, *see id.* at 162-63. Indeed, Hughes personnel prepared and distributed an internal "contact report" detailing the allegations at issue in the investigation and suggesting an appropriate response. *See id.* at 48-54, 169.

The Government ultimately concluded its investigation in November 1991. The six-year probe determined that—contrary to the Government's preliminary conclusions—Hughes' challenged accounting practices had not

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[3] As the investigation progressed, the Government directed Northrop to withhold an additional $3.8 million in payments under the B-2 subcontract. In total, $15.4 million in payments were withheld under that subcontract during the government investigation. *See* Pet. App. at 3a; J.A. at 162.

only complied with all applicable regulations, but actually had *benefitted* the Government by charging costs to the fixed-price F-15 program that otherwise would have been borne solely by the cost-plus B-2 program. *See* J.A. at 136-37. Accordingly, the Government (1) withdrew its earlier finding of noncompliance with respect to Hughes' accounting practices, (2) determined that any noncompliance with accounting disclosure requirements was immaterial, and (3) paid Hughes the $15.4 million previously withheld on the B-2 project. *See* Pet. App. at 67a-68a; J.A. at 136-37, 142-45.

C. The Schumer Complaint

The Government's final determination, however, did not end the dispute over Hughes' accounting practices. In September 1988, Hughes had denied a promotion to respondent William J. Schumer, previously the Division Contracts Manager of Hughes' B-2 division, and reassigned him to a different division. *See* J.A. at 88-89. In January 1989, Schumer (while still employed by Hughes) filed this action under the *qui tam* provisions of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733. *See* J.A. at 69-82. Schumer's complaint parroted the allegations of accounting irregularities that were then the subject of the pending government investigation. *See id.* at 72-81. The complaint asserted that, as a result of these alleged irregularities, Hughes had overcharged the Government by $40 million. The complaint sought treble damages of $120 million. *See id.* at 81. (Schumer subsequently amended his complaint to allege an overcharge of $50 million and to request treble damages of $150 million. *See id.* at 102.)

Although the Government has the right to intervene in and conduct the prosecution of a *qui tam* action, *see* 31 U.S.C. § 3730(b)(2), it declined to do so here. *See* J.A. at 103-05.

D. The District Court Proceedings

Hughes moved to dismiss Schumer's complaint on three grounds. *First*, Hughes argued that the action was barred under the FCA as it existed at the time of the challenged conduct and

that the 1986 amendments to the statute, which relaxed the restrictions on *qui tam* lawsuits, did not apply retroactively. *Second*, Hughes argued that the action was barred even under the post-1986 version of the FCA, because Schumer was not a "whistleblower" with inside information, but rather a "parasitic" relator whose action was based on allegations disclosed by the Government during its extensive investigation and audits. *Third*, Hughes argued that the FCA's *qui tam* provisions, which deputize private parties to enforce the laws of the United States on behalf and in the name of the United States, are unconstitutional. The District Court (Pfaelzer, J., C.D. Cal.) summarily denied the motions in November 1990. *See* Pet. App. at 34a-35a.

Hughes subsequently moved for summary judgment on the merits as to all claims, and the District Court granted the motion in May 1992. Pet. App. at 36a-37a. In extensive findings, the District Court concluded that: (1) the RDP commonality agreement had properly allocated costs between the F-15 and B-2 programs, *id.* at 46a-49a; (2) the ASC commonality agreement had properly divided between the F-15 and B-2 programs costs that could have been charged to the B-2 program alone, *id.* at 50a; and (3) Hughes had disclosed the contents of the RDP and ASC commonality agreements to Northrop and the Air Force, *id.* at 46a-48a, 56a. Accordingly, the District Court concluded that "Schumer has not shown that Hughes violated the False Claims Act." *Id.* at 64a.

E. The Ninth Circuit Proceedings

Schumer appealed on the merits, and Hughes cross-appealed on the retroactivity and "parasitic" bar issues. The Court of Appeals for the Ninth Circuit affirmed in part and reversed in part. Pet. App. at 1a-31a.

The Court of Appeals first affirmed the District Court's conclusion that this action is governed by the post-1986 version of the FCA even though the challenged conduct took place prior to 1986. *See* Pet. App. at 5a-7a. The Ninth Circuit began its retroactivity analysis by noting that the 1986 FCA

amendments had, among other things, expanded the circumstances under which a *qui tam* relator could bring an FCA action. Whereas prior to 1986, the statute barred any *qui tam* action "based on evidence or information the Government had when the action was brought," 31 U.S.C. § 3730(b)(4) (1982), the 1986 amendments limited that bar to actions "based on the public disclosure of allegations or transactions" by the Government or the media, unless the relator was an "original source" of the information, 31 U.S.C. § 3730 (e)(4)(A). The Ninth Circuit acknowledged that, but for the 1986 amendments, this suit would be dismissed outright: "Since the government was aware of Schumer's allegations before he filed his suit, the pre-1986 rules would bar his claim." Pet. App. at 6a. Nonetheless, the court held that the 1986 amendment expanding a relator's ability to sue should be applied retroactively to suits based on pre-1986 conduct because the relevant FCA provision involved only the "subject matter jurisdiction" of courts to hear *qui tam* claims and did not affect the substantive liability of *qui tam* defendants. *Id.* at 6a-7a.

The Ninth Circuit then proceeded to announce an expansive interpretation of a *qui tam* relator's ability to sue under the post-1986 version of the FCA. According to the court, the 1986 amendments abandoned the traditional bar against "parasitic" *qui tam* actions and authorized employees of government contractors to file *qui tam* actions based on information disclosed by the Government during an audit or investigation. *See* Pet. App. at 8a-11a. Although the Act bars any *qui tam* suit "based upon the public disclosure of allegations" in a government audit or investigation, the court held that it would be "unrealistic" to construe government disclosure of information to a contractor's employees as "public disclosure." In the court's view, such employees (unlike other members of the public) have an economic incentive to suppress allegations of wrongdoing. *Id.* at 9a. Indeed, the court held that even disclosure to the employees of an innocent contractor (like Northrop) did not qualify as "public disclosure" because all defense contractors and their

employees "operate within a closed loop of secrecy." *Id.* Thus, the court held that Schumer was a proper *qui tam* relator, regardless of whether he was a "whistleblower" with inside information or instead had opportunistically based his action on allegations of wrongdoing disclosed in the government audits and investigation.

Turning to the merits, the Ninth Circuit affirmed the District Court's conclusion that Hughes' commonality accounting practices complied with applicable government regulations and properly allocated costs between the B-2 and F-15 programs. Pet. App. at 15a-19a (ASC costs), 21a-22a (RDP costs). Indeed, the court acknowledged that the challenged accounting practices had actually *saved* the Government money. *See id.* at 4a. Nonetheless, the Ninth Circuit held that Schumer had presented "genuine issues of material fact" under the FCA by challenging the adequacy of Hughes' *disclosure* of its proper accounting practices to Northrop, *id.* at 19a-22a, and to the Government, *see id.* at 22a-26a. Whether these alleged disclosure infractions were capable of injuring the public fisc, the Ninth Circuit declared, was immaterial. "[T]he lack of a determination of actual harm [from noncompliance with a disclosure obligation] does not preclude a claim under the FCA." *Id.* at 25a.

SUMMARY OF ARGUMENT

The Ninth Circuit erred in three fundamental respects.

First, the court erred by applying the 1986 FCA amendments retroactively to authorize *qui tam* actions barred under the law in effect at the time of the wrongdoing alleged. But for those amendments, this action (which challenges pre-1986 conduct) would have been barred outright by virtue of the Government's prior knowledge of the underlying allegations. By relaxing the "government knowledge" bar to *qui tam* suits, the 1986 amendments necessarily increased legal burdens on *qui tam* defendants. Enforcement of the law by private parties as well as by the Government is substantially more burdensome than enforcement by the Government alone: private parties lack the

objective prosecutorial discretion of government law-enforcement officials because they are driven not by the public interest, but by personal ill will or desire for profit. Moreover, after the 1986 amendments, a government contractor could no longer avoid a *qui tam* action by disclosing potential irregularities to the Government. The fact that the amended version of the FCA employs the word "jurisdiction" does not reverse the traditional presumption against retroactivity; the amendment affects the *substantive* legal rights of FCA defendants by broadening the universe of FCA plaintiffs.

Second, the court erred by holding that the FCA permits employees of government contractors to file *qui tam* actions based on allegations disclosed by the Government during an audit or investigation. The FCA's *qui tam* provisions seek to encourage "whistleblowers" to expose previously-undisclosed allegations of fraud, not to spawn "parasitic" actions based on allegations already disclosed by the Government. A "public disclosure" within the meaning of the statute thus occurs when the Government reveals allegations of wrongdoing to a member of the public who is a stranger to the fraud.

Third, the court erred by holding that noncompliance with accounting *disclosure* regulations can give rise to FCA liability even where the underlying accounting practices themselves do not. The FCA does not proscribe any and all infractions by a government contractor: it proscribes only the submission of *false claims*. By definition, a "claim" is not "false" if the claimant is entitled to the money requested. Thus, an alleged infraction of a contract, statute, or regulation that does not result in an inflated "claim" against the public fisc simply cannot give rise to FCA liability.

ARGUMENT

I. THE 1986 FCA AMENDMENTS RELAXING THE RESTRICTIONS ON *QUI TAM* LAWSUITS DO NOT APPLY RETROACTIVELY.

The Ninth Circuit erred, as a threshold matter, by applying the 1986 FCA amendments retroactively to authorize *qui tam* actions barred under the law in effect at the time of the wrongdoing alleged. The conduct at issue in this case occurred exclusively before 1986. Under the pre-1986 version of the FCA, this action is barred outright by virtue of the Government's knowledge of the underlying allegations. *See* 31 U.S.C. § 3730(b)(4) (1982) ("[T]he court shall dismiss an action . . . based on evidence or information the Government had when the action was brought."). By relaxing that absolute bar, the amended version of § 3730 authorized *qui tam* actions that would have been precluded under prior law. Nothing in the 1986 amendments, however, indicates that Congress intended this change to authorize previously barred actions based on pre-1986 conduct. The 1986 FCA amendments (as the Ninth Circuit conceded) are silent on the issue of retroactivity. *See* Pet. App. at 6a.

Under basic tenets of statutory construction, thus, the amended version of § 3730 should not be applied retroactively in lawsuits challenging pre-1986 conduct. It is an elementary principle of jurisprudence that "[w]ords in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied." *United States v. Heth*, 3 Cranch (7 U.S.) 399, 413 (1806). This Court emphatically reaffirmed that principle only three Terms ago in *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1497-1501 (1994). "[P]rospectivity remains the appropriate default rule," the Court declared, and a statute will not be given retroactive effect in the absence of "clear intent" by Congress. *Id.* at 1501.

Although the Ninth Circuit duly recited that rule, *see* Pet. App. at 6a, the court refused to apply it here for two basic reasons. *First*, the court suggested that the amended version of § 3730 was not truly retroactive with respect to pre-1986 conduct because expanding the opportunities for relators to bring FCA *qui tam* actions had no "deleterious effect" on FCA defendants' "substantive rights." *Id.* at 7a. *Second*, the court held that the 1986 amendment to § 3730 "altered subject matter jurisdiction rules," and thus fell within an "exception" to the general rule against retroactivity. *Id.* at 5a. Neither reason withstands scrutiny.

A. Application of Amended Section 3730 to Pre-1986 Conduct Is Impermissibly Retroactive.

At the outset of any retroactivity analysis, "the court must determine whether the new statute would have retroactive effect." *Landgraf*, 114 S. Ct. at 1505. A statute does not operate "retroactively" in any legally relevant sense simply because it affects antecedent conduct. *Id.* at 1499. Rather, the statute must "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 1505.

Although application of this analysis "is not always a simple or mechanical task," *id.* at 1498, this Court has specified that the central inquiry is "whether the new provision attaches new *legal* consequences to events completed before its enactment," *id.* at 1499 (emphasis added). *See also id.* at 1497 ("'The principle that the *legal effect* of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal.'") (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)) (emphasis added). Laws that alter the *legal* consequences of past conduct have retroactive effect; laws that merely alter the *factual* consequences of such conduct do not.

An example from *Landgraf* makes the point: although "a new law banning gambling harms the person who had begun to construct a casino before the law's enactment," such a law has no retroactive effect with respect to the casino builder for the simple reason that it does not attach any new *legal* consequences to his past conduct. *See* 114 S. Ct. at 1499 n.24. Whether, as a *factual* matter, the builder is forced into bankruptcy is immaterial. If, in contrast, the new statute creates a private right of action for the violation of a building code, it would indeed operate retroactively if construed to authorize previously barred private lawsuits against the builder based on past construction.[4] A law that allows private parties to bring a legal action challenging past conduct necessarily attaches new legal consequences to that conduct.

For this reason, the 1986 amendments to § 3730 altered the legal consequences of an FCA defendant's pre-1986 conduct. The Ninth Circuit created a false dichotomy by declaring that the amended version of § 3730 "'did not alter [an FCA defendant's] underlying liability; it only altered the conditions under which a *qui tam* relator can bring an action to enforce that liability.'" Pet. App. at 7a (quoting *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1408 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1319 (1996)). If construed to authorize previously barred *qui tam* actions (like this one) challenging past conduct, the new statute self-evidently expands an FCA defendant's liability. Thus, for example, creation of a new private right of action for violation of a federal regulation imposes a substantial new burden upon the regulated party—even though the Government itself could

[4] Another way of analyzing the issue is to characterize a law as retroactive if it seeks to regulate past conduct. A new law banning gambling regulates the future conduct of gambling, not the past conduct of building casinos. A new law creating a private right of action to enforce building standards, in contrast, operates retroactively if applied to regulate the past conduct of casino-building. *See Landgraf*, 114 S. Ct. at 1526 n.3 (Scalia, J., concurring in judgment).

previously have enforced the regulation. Enforcement of the law by private parties as well as by the Government is substantially different, and more burdensome, than enforcement by the Government alone. That is why it is inappropriate to construe a statute creating a new private right of action to apply retroactively to past conduct. *See, e.g.*, *Fagundez v. Oakland Raiders Prof. Football Club*, 498 F.2d 1394, 1395 (Temp. Emer. Ct. Apps. 1974); *cf. Rivera-Flores v. Puerto Rico Tel. Co.*, 64 F.3d 742, 751-52 (1st Cir. 1995); *Katzer v. Baldor Elec. Co.*, 969 F.2d 935, 940 (10th Cir. 1992).

This case is a sterling example of the point. The allegations of wrongdoing at issue here are wholly technical. The Government investigated those allegations at length and concluded that the alleged wrongdoing had actually *saved* the Government money. *See* Pet. App. at 4a; J.A. at 136. Not surprisingly, thus, the Government declined to intervene in this action. *See* J.A. at 103-05. Nonetheless, respondent Schumer has doggedly persisted. Private parties simply do not have the same incentives, or the same norms of prosecutorial discretion, as do public officials. Indeed, that is the fundamental justification for *qui tam* actions in the first place. *See, e.g.*, *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.5 (1943). Attorneys representing *qui tam* relators have an ethical obligation zealously to serve their clients (*i.e.*, to maximize their monetary recovery), whereas attorneys representing the United States have an ethical obligation to ensure that justice is served. *See, e.g.*, *Berger v. United States*, 295 U.S. 78, 88 (1935); *cf. Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987).

The 1986 amendment to § 3730 expanding a government contractor's exposure to *qui tam* lawsuits "is also the type of legal change that would have an impact on private parties' planning." *Landgraf*, 114 S. Ct. at 1506. Prior to 1986, a government contractor could avoid a *qui tam* lawsuit by voluntarily disclosing actual or potential contract irregularities to the Government. *See* Waldman, *The 1986 Amendments to*

the False Claims Act: Retroactive or Prospective?, 18 Pub. Cont. L.J. 469, 481 (1989) ("Under the old law, a contractor could disclose the pertinent information about the fraud and foreclose the bringing of a claim by a relator."). The amendment of § 3730 eliminated this absolute "government knowledge" defense. A contractor's best efforts to avert a *qui tam* lawsuit by forthrightly addressing a problem could thus be rendered for naught. By narrowing the circumstances under which a contractor could foreclose a *qui tam* suit, the amendment of § 3730 impaired the contractor's substantive legal rights. *See, e.g.*, *Winfree v. Northern Pac. Ry.*, 227 U.S. 296, 301 (1913) (elimination of material defense impairs substantive right). Thus, the provisions that govern an FCA *qui tam* suit "are those that were in effect at the time the conduct that is the subject of the litigation occurred." *United States v. TRW, Inc.*, 4 F.3d 417, 422-23 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1370 (1994).[5]

It is no answer to suggest, as has the Ninth Circuit, that a new law does not attach "new legal consequences" to past conduct when that conduct was already unlawful in the past. *See Lindenthal*, 61 F.3d at 1408 ("The amendment simply did not alter [the defendant's] underlying obligation not to commit fraud upon the government."). This Court confronted, and rejected, that precise argument in *Landgraf*. The *Landgraf* Court acknowledged that intentional employment discrimination had been unlawful for more than a generation, but insisted that the *extent*, as well as the *fact*, of liability is legally relevant. *See* 114 S. Ct. at 1506. "Even when the conduct in question is morally reprehensible or illegal, a degree of unfairness is inherent whenever the law imposes additional

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[5] This Court has previously recognized that retroactive application of private enforcement actions to past conduct can disrupt settled regulatory expectations. Thus, in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60-61 (1987), the Court construed the citizen-suit provision of the Clean Water Act to apply prospectively only in light of settled understandings regarding government enforcement.

burdens based on conduct that occurred in the past." *Id.* at 1506 n.35. *See also Rivers v. Roadway Express, Inc.*, 114 S. Ct. 1510, 1515 (1994) (noting that statute can alter legal consequences of past conduct even where it does not purport to alter the "normative scope" of such conduct).

B. Retroactive Application of Amended Section 3730 Is Not Justified by the Presence of the Statutory Term "Jurisdiction."

The Ninth Circuit also attempted to justify its refusal to apply the venerable presumption against retroactivity by characterizing § 3730 as a limitation on judicial "subject matter jurisdiction," and hence "within an exception" to that presumption. Pet. App. at 5a-6a. The court's reasoning was remarkably wooden: a provision must be deemed "jurisdictional," and thus presumptively retroactive, if it uses the word "jurisdiction." *See id.* at 7a. That reasoning, and hence the court's conclusion, are fundamentally flawed.

It is true that this Court has generally applied statutes altering a court's subject-matter jurisdiction retroactively to cases involving pre-enactment conduct. *See Landgraf*, 114 S. Ct. at 1501-02. But that is not because such statutes use the magic word "jurisdiction," but because they typically do not affect the substantive rights of litigants. "Present law *normally* governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'" *Id.* at 1502 (quoting *Republic Nat'l Bank v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring)) (emphasis added). Because a litigant has no right to any particular tribunal, a new rule altering the subject-matter jurisdiction of a court "*usually* 'takes away no substantive right but simply changes the tribunal that is to hear the case.'" *Landgraf*, 114 S. Ct. at 1502 (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)) (emphasis added).

Thus, for example, in *Bruner v. United States*, 343 U.S. 112 (1952), this Court held that a new statute placing certain actions by federal employees within the exclusive jurisdiction

of the Court of Claims required dismissal of an action previously (and properly) filed in federal district court. "Congress has not altered the nature or validity of petitioner's rights or the Government's liability," the *Bruner* Court emphasized, "but has simply reduced the number of tribunals authorized to hear and determine such rights and liabilities." 343 U.S. at 117. *See also Hallowell*, 239 U.S. at 508 (noting that amended statute limiting federal-court jurisdiction over certain disputes involving allotment of Indian lands "takes away no substantive right, but simply changes the tribunal that is to hear the case"); *The Assessors v. Osbornes*, 9 Wall. (76 U.S.) 567, 572-75 (1869) (noting that repeal of federal-court jurisdiction over certain tax actions meant that such suits "must be commenced in the State courts").

These cases do not remotely establish the proposition that a court must mechanically apply any and every statutory provision using the word "jurisdiction" to pre-enactment conduct. That word is one of the most over-used in the legal lexicon, and encompasses a broad variety of meanings. "[J]urisdiction . . . is a many-hued term." *Peretz v. United States*, 501 U.S. 923, 953 (1991) (Scalia, J., dissenting) (internal quotation omitted). *See also Center for Nuclear Responsibility, Inc. v. United States Nuclear Regulatory Comm'n*, 781 F.2d 935, 945 n.4 (D.C. Cir. 1986) (R.B. Ginsburg, J., dissenting) (criticizing "profligate use of the term 'jurisdiction'" to mean many different things, and cautioning that indiscriminate use of the term "has all the tenacity of original sin and must constantly be guarded against"); *Rose v. Town of Harwich*, 778 F.2d 77, 79 (1st Cir. 1985) (noting "protean quality" of word "jurisdiction") (Breyer, J.), *cert. denied*, 476 U.S. 1159 (1986).

This case does not fall within the line of cases in which this Court has retroactively applied statutes altering judicial subject-matter jurisdiction. The 1986 amendments to § 3730 are substantive in nature: they expanded the power of *qui tam* relators to file private FCA enforcement actions in order to

expose and deter fraud against the Government. The amended version of § 3730 would be no different if phrased, "A relator may not bring an action based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing . . . ."[6] Congress routinely expresses substantive limitations in jurisdictional terms.[7] Accordingly, this provision is no more "jurisdictional" than one specifying: "A court shall have jurisdiction to award punitive damages in any case involving intentional employment discrimination." *Cf. Landgraf*, 114 S. Ct. at 1505-06 (holding that availability of punitive damages is substantive change that does not apply retroactively in the absence of clear intent). It is not the word "jurisdiction," but the substantive scope of the statute, that is dispositive.

Indeed, it is far from clear whether the word "jurisdiction" in § 3730 defines a court's subject-matter jurisdiction at all. As the Seventh Circuit (per Judge Easterbrook) has noted, the "adjudicatory power" of the court "is conferred by §§ 1331, 1345, and 3732(a) rather than 'this section' (sec. 3730)." *United States ex rel. Fallon v. Accudyne Corp.*, 97 F.3d 937, 941 (7th Cir. 1996). Section 3730 "does not curtail the categories of disputes that may be resolved (a real 'jurisdictional' limit) but instead determines who may speak for the United States on a subject, and who if anyone gets a financial reward." *Id.* Notwithstanding its use of the term "jurisdiction," in other words, § 3730 simply does not "speak to the power of the court." *Landgraf*, 114 S. Ct. at 1502

[6] Indeed, the statutory subsection immediately preceding the provision at issue here is phrased in precisely this way. *See* 31 U.S.C. § 3730(e)(3) ("In no event may a person bring an action . . . which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.").

[7] *See, e.g.*, 25 U.S.C. § 1772f(b) ("[T]he court shall not have jurisdiction to award money damages against the State, the district or the tribe."); 26 U.S.C. § 7426(b) ("The district court shall have jurisdiction to grant only the following forms of relief . . . .").

(internal quotation omitted). That power is conferred by the provision of the FCA that *does* govern the court's subject-matter jurisdiction, 31 U.S.C. § 3732 ("False Claims Jurisdiction"). *See Fallon*, 97 F.3d at 940 ("§ 3732(a) grants subject-matter jurisdiction for false-claims suits—as if that were needed in light of the general grant of federal-question jurisdiction, 28 U.S.C. § 1331, and the special grant of jurisdiction for civil litigation in which the United States is the plaintiff, 28 U.S.C. § 1345.").

In the final analysis, the situation here is materially indistinguishable from the situation in which a new law either shortens or lengthens a statute of limitations. In a loose sense, such a change can be characterized as "jurisdictional," since it either precludes or authorizes invocation of a court's jurisdiction. It is well-established, however, that an amended statute of limitations should not be applied retroactively if the effect would be either (in the case of lengthened limitations period) to revive an action previously barred or (in the case of a shortened limitations period) to bar an action previously authorized. *See, e.g., United States v. St. Louis, S.F. & T. Ry.*, 270 U.S. 1, 3 (1926) (Brandeis, J.); *Fullerton-Krueger Lumber Co. v. Northern Pac. Ry.*, 266 U.S. 435, 437 (1925); *Herrick v. Boquillas Land & Cattle Co.*, 200 U.S. 97, 101-02 (1906); *Sohn v. Waterson*, 17 Wall. (84 U.S.) 596, 598-99 (1873). Because the amended version of § 3730 authorizes actions that were previously barred, it should not be applied retroactively. Although it is not *per se* unconstitutional for Congress to revive a previously barred claim, *see Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 311-16 (1945), such an "outcome is sufficiently unusual that the legislature should say so pretty clearly before a court will conclude that the statute produces this effect." *United States v. Kimberlin*, 776 F.2d 1344, 1347 (7th Cir. 1985), *cert. denied*, 476 U.S. 1142 (1986).[8]

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[8] On several occasions in recent years, bills have been introduced in (continued...)

II. THE 1986 FCA AMENDMENTS DO NOT AUTHORIZE "PARASITIC" *QUI TAM* ACTIONS BASED ON INFORMATION DISCLOSED BY THE GOVERNMENT.

Even assuming that the post-1986 version of § 3730 applies retroactively to pre-1986 conduct, the Ninth Circuit fundamentally misconstrued the statute. The whole point of the FCA's *qui tam* provisions is to encourage "whistleblowers" to expose previously-undisclosed fraud against the Government, not to create a windfall for "parasitic" plaintiffs who learn of allegations of fraud disclosed by the Government or the news media. The amended version of § 3730 thus expressly bars *qui tam* suits based upon the "public disclosure" of allegations by the Government or the media.

The Ninth Circuit, however, essentially wrote the "public disclosure" provision out of the statute by holding that it does not apply to employees of government contractors. According to the Ninth Circuit, a government disclosure to a contractor's "innocent employees" (*i.e.*, those not involved in an alleged fraud) cannot *as a matter of law* qualify as a "public disclosure." *See* Pet. App. at 8a-11a. The court's rationale was explicitly policy-based: "Because the employee has a strong economic incentive to protect the information from outsiders, revelation of information to an employee does not trigger the potential for corrective action presented by other forms of disclosure." *Id.* at 9a. The Ninth Circuit thus rejected Hughes'

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[8] (...continued)
Congress that would specifically direct courts to apply the 1986 FCA amendments retroactively. *See, e.g.*, S. 841, 103d Cong., 1st Sess. § 8(b)(1) (1993); H.R. 2915, 103d Cong., 1st Sess. § 8(b)(1) (1993); H.R. 4563, 102d Cong., 2d Sess. § 6(b)(1) (1992). None was enacted into law. Although the failure of these bills is scarcely conclusive on the meaning of the 1986 amendments, it underscores that Congress is perfectly capable of drafting explicit language on retroactivity. This Court should not hand the proponents of retroactivity a victory they failed to achieve in the Legislature. *See, e.g., Landgraf*, 114 S. Ct. at 1491-92.

argument that this action should be dismissed because it is based on information disclosed by the Government's mid-1980s investigation and audits of Hughes' commonality accounting practices.

The Ninth Circuit's holding that the FCA authorizes "parasitic" *qui tam* actions by a contractor's employees conflicts not only with the statute's text, structure, purpose, and history, but with common sense.

A. The "Public Disclosure" Provision Preserves the Traditional Bar Against "Parasitic" *Qui Tam* Actions.

As in any case involving statutory interpretation, the starting point here is the text of the statute. *See, e.g.*, *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Unfortunately, the relevant language is hardly a model of artful drafting. *See, e.g.*, J. Boese, *Civil False Claims and Qui Tam Actions* 4-32 (1995 Supp.) (describing statutory text as "imprecise and at times contradictory"). In pertinent part, the statute bars *qui tam* actions

> based upon the *public disclosure* of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media unless . . . the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A) (emphasis added). In determining whether this provision bars a particular action, the threshold question is whether there has been a "public disclosure" of the underlying allegations or transactions.[9]

[9] Because the Ninth Circuit held as a matter of law that no "public disclosure" had occurred here, it did not reach the further questions (1) whether this action is "based upon" any such disclosure, or (2) whether Schumer was an "original source" of the information disclosed. *See* Pet. (continued...)

The term "public disclosure" is neither defined in the statute nor a term of art with an established common law meaning. *Cf. Morissette v. United States*, 342 U.S. 246, 263 (1952). Its meaning, thus, must be derived from ordinary English, as informed by the structure, purpose, and history of the statute. *See, e.g.*, *Brotherhood of Locomotive Eng'rs v. Atchison, Topeka & Santa Fe R.R.*, 116 S. Ct. 595, 598, 600 (1996); *United States v. Board of Comm'rs*, 435 U.S. 110, 117-18 (1978).

Viewed in isolation, the term "public disclosure" is susceptible to a range of plausible meanings, from disclosure to the *general* public to disclosure to *some member* of the public. The statute, however, provides important context. Section 3730 refers not to "public disclosure" in the abstract, but to public disclosure of "allegations or transactions" in (1) "a criminal, civil, or administrative hearing," (2) "a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation," or (3) "the news media." 31 U.S.C. § 3730(e)(4)(A). It is readily apparent that not all of these means of disclosure entail dissemination to the general public. A government "audit" or "investigation" typically remains unknown and indeed incomprehensible to all but a few members of the public. "[T]he news media," in fact, is the *only* listed means of disclosure that would likely succeed in making particular "allegations or transactions" known to the public at large.

In context, then, it seems clear that "public disclosure" takes place either when the Government discloses allegations or transactions to some member of the public in the course of an investigatory or enforcement action, or when the news media disseminates such information to the public at large. Because the employees of a government contractor are undoubtedly members of the public, they are barred under § 3730 from

[9] (...continued)
App. at 14a.

filing "parasitic" *qui tam* actions based on information disclosed by the Government in an investigation or audit. *See, e.g.*, *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 322 (2d Cir. 1992) ("public disclosure" occurs whenever Government "actually divulge[s]" an alleged fraud to "strangers to the fraud," including a contractor's "innocent employees"). "[T]here is no reason to distinguish between [a contractor's] employees and any private citizen to whom a copy of a government investigative report is 'leaked.' . . . [T]he person is a member of the general public (*i.e.*, not a government official), so the disclosure is a public one." Vogel, *Eligibility Requirements for Relators Under Qui Tam Provisions of the False Claims Act*, 21 Pub. Cont. L. J. 593, 606 (1992).[10] "Once allegations of fraud are revealed to members of the public with no prior knowledge thereof, the government can no longer throw a cloak of secrecy around the allegations; they are irretrievably released into the public domain." *Doe,* 960 F.2d at 323.[11]

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[10] *See also* Salcido, *Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Public Disclosure Jurisdictional Bar to Qui Tam Actions Under the False Claims Act*, 24 Pub. Cont. L. J. 237, 262 (1995) ("[I]nformation [is] public if it reaches a single individual (a 'stranger to the fraud').").

[11] Indeed, Congress is perfectly capable of specifying, if it so wishes, that "public disclosure" must entail disclosure to the *general* public. In 1992, a bill was introduced in the House of Representatives that would have amended § 3730(e)(4) to provide: "No court shall have jurisdiction over an action . . . in which all of the material facts and allegations are obtained from a news media report or reports, or a disclosure to the *general public* of a document or documents (i) created by the Federal Government; (ii) filed in a lawsuit to which the Federal Government is a party; or (iii) relating to an open and active investigation by the Federal Government; unless the person bringing the action is an original source of such facts and allegations." H.R. 4563, 102d Cong., 2d Sess. § 3 (1992) (emphasis added). That bill, however, was not enacted. As noted above, *see supra* n.8, the proponents of expanded *qui tam* jurisdiction should not be handed in court a victory that eluded them in Congress.

This contextual interpretation of "public disclosure" strongly comports with the provision's purpose and history. *Cf. John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank,* 510 U.S. 86, 94-95 (1993) (statutory interpretation "guided not by a single sentence or member of a sentence, but look[s] to the provisions of the whole law, and to its object and policy") (internal quotation omitted). The FCA has formed part of the U.S. Code for more than a century; its past interpretation and application provide important guidance to the meaning of the 1986 amendments. "The past serves as prologue; some familiarity with th[e] tortuous, wending history [of the FCA] is critical to an understanding of the latest set of amendments to the *qui tam* provisions." *United States ex rel. Springfield Terminal Ry. v. Quinn,* 14 F.3d 645, 649 (D.C. Cir. 1994); *see also United States ex rel. S. Prawer & Co. v. Fleet Bank,* 24 F.3d 320, 324-26 (1st Cir. 1994).

During the eighty years following the FCA's enactment during the Civil War, no court ever held that the Act authorized a *qui tam* relator to bring a lawsuit based on information obtained from the Government. Indeed, in no reported case did a litigant even advance such a theory. In 1943, however, this Court upset the settled understanding of *qui tam* jurisdiction by holding in *United States ex rel. Marcus v. Hess,* 317 U.S. 537, that the plain language of the 1863 Act authorized "parasitic" *qui tam* actions based on information copied from a criminal indictment.[12] Justice Jackson, in dissent, conceded that the Court's interpretation was consistent with the Act's literal terms, *see* 317 U.S. at 556-57, but noted that "[n]ever until now has the bar dreamed that it permitted such use," *id.* at 559. "If the statute has all these eighty years authorized this sort of proceeding, the legal profession of the United States has been

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[12] The 1863 statute contained a broad *qui tam* provision authorizing "any person" to prosecute a claim on behalf and in the name of the United States "against any person who knowingly submitted a false claim to the Government." *See* Act of March 2, 1863, ch. 67, 12 Stat. 696.

strangely unresponsive to a Congressional proffer of windfall income." *Id.* (dissenting opinion).

In the wake of this Court's decision, Congress swiftly amended the FCA to make explicit what had always been implicit: the Act's *qui tam* provisions were intended to create an incentive for "whistleblowers" to bring fraud to light, not a windfall for "parasitic" relators. As amended in 1943, the statute expressly precluded *qui tam* actions "based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought." *See* Act of Dec. 23, 1943, Pub. L. No. 213, ch. 377, 57 Stat. 608.[13]

Congress revisited the FCA in the mid-1980s to address what it saw as two shortcomings of the 1943 amendment: by its terms, that amendment precluded *qui tam* actions even when (1) the would-be relator was the source of the Government's prior knowledge, *see, e.g.*, *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100, 1104-06 (7th Cir. 1984); *United States ex rel. Pettis v. Morrison-Knudsen Co.*, 577 F.2d 668, 671-73 (9th Cir. 1978), and (2) the Executive Branch had done absolutely nothing with respect to the allegations of wrongdoing, *see, e.g.*, *United States ex rel. Lapin v. International Business Machines Corp.*, 490 F. Supp. 244, 247 (D. Haw. 1980). Accordingly, as part of a general overhaul of the FCA in 1986, Congress relaxed the statutory restrictions on *qui tam* relators.[14] The amended version of § 3730 replaced the

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[13] Congress modified the wording of this provision in 1982 to preclude *qui tam* actions "based on evidence or information the Government had when the action was brought." *See* Act of Sept. 13, 1982, Pub. L. No. 97-258, 96 Stat. 978. The 1982 amendment was intended to "restate" the previous provision "without substantive change." H.R. Rep. No. 651, 97th Cong., 2d Sess. 1 (1982).

[14] The 1986 amendments also sought to encourage *qui tam* actions by extending the statute of limitations, *see* 31 U.S.C. § 3731, reducing the *scienter* requirement, *id.* § 3729(b), lowering the burden of proof, *id.*

(continued...)

1943 "government knowledge" bar with the "public disclosure" bar at issue here, and explicitly authorized the "original source" of the disclosed information to sue. *Compare* 31 U.S.C. § 3730(b)(4) (1982) *with* 31 U.S.C. § 3730(e)(4) (1986).

By replacing the "government knowledge" bar with the "public disclosure" bar, however, Congress in no way repudiated the traditional understanding that the FCA's *qui tam* provisions are meant to encourage "whistleblowers" to expose previously-undisclosed fraud. Rather, the amendment sought to ensure that government *inaction* with respect to particular allegations of fraud would not have the effect of barring a *qui tam* suit involving those allegations. *See Doe*, 960 F.2d at 323.[15] Thus, the "public disclosure" provision barred *qui tam* actions based on allegations or transactions disclosed in the course of affirmative investigatory or law-enforcement efforts by the Government. The various means of government disclosure set forth in § 3730(e)(4) underscore this point—they indicate that the Government is "on the trail of the alleged fraud without [the relator's] assistance." *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 571 (10th Cir. 1995). Under these circumstances, a *qui tam* action based on a government disclosure would serve no useful purpose.

The "original source" provision in the amended version of § 3730 further underscores Congress' intent to enlist "the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity." S. Rep. No. 345, 99th Cong., 2d Sess. 4 (1986). To qualify as an "original source" of information that has been publicly disclosed, a

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(...continued)

§ 3731(c), increasing the statutory penalties, *id.* § 3729(a), and increasing the bounty available to *qui tam* relators, *id.* §§ 3730(d)(1) & (2).

[15] Under the pre-1986 version of § 3730, an action was deemed to be "based on" evidence or information in the Government's possession (and thus barred) if it involved subject matter known to the Government, even where the relator did not derive the evidence or information from the Government. *See, e.g.*, *Dean*, 729 F.2d at 1103-04; *Pettis*, 577 F.2d at 674.

relator must have had "*direct* and *independent* knowledge of th[at] information." 31 U.S.C. § 3730(e)(4)(B) (emphasis added). Almost by definition, such "direct" and "independent" knowledge of fraud will be limited to those with firsthand knowledge of the alleged fraud. *See, e.g., United States ex rel. Barth v. Ridgedale Elec., Inc.*, 44 F.3d 699, 703 (8th Cir. 1995); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1160-61 (3d Cir. 1991).

The 1986 amendments to § 3730 thus sought to achieve "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own." *Springfield Terminal*, 14 F.3d at 649.[16] In light of those amendments, the mere existence of incriminating information in government files would no longer bar a *qui tam* action involving that same information, but government disclosure of the information to a member of the public in the course of an investigation would bar the suit (unless the relator was an "original source" with "direct" and "independent" knowledge of the information). *See, e.g.*, Boese, *Civil False Claims*, at 4-36 (public disclosure

[16] *See also United States ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509, 1511 (8th Cir. 1994) ("The Act's jurisdictional scheme is designed to promote private citizen involvement in exposing fraud against the government, while at the same time prevent parasitic suits by opportunistic late-comers who add nothing to the exposure of the fraud."), *cert. denied*, 115 S. Ct. 2579 (1995); *United States ex rel. Cooper v. Blue Cross & Blue Shield*, 19 F.3d 562, 565 (11th Cir. 1994) *(per curiam)* ("The 1986 amendments were intended to increase private citizen involvement in exposing fraud against the government while preventing opportunistic suits by private persons who heard of fraud but played no part in exposing it."); *United States ex rel. Precision Co. v. Koch Inds.*, 971 F.2d 548, 552 (10th Cir. 1992) (noting that § 3730(e)(4) "has two basic goals: (1) to encourage private citizens with first-hand knowledge to expose fraud; and (2) to avoid civil actions by opportunists attempting to capitalize on public information without seriously contributing to the disclosure of the fraud"), *cert. denied*, 507 U.S. 951 (1993).

by the Government "implies a positive act taken with intent to disclose, *i.e.*, something more than mere preparation of documentation regarding fraud").

The "public disclosure" provision, in other words, preserves the FCA's traditional distinction between "whistleblower" and "parasitic" actions. *See, e.g., Federal Recovery Servs., Inc. v. United States*, 72 F.3d 447, 452 (5th Cir. 1995) (§ 3730(e)(4) "prevent[s] parasitic suits based on information discovered by others"); *Hindo v. University Health Sciences/The Chicago Medical School*, 65 F.3d 608, 612-13 (7th Cir. 1995) (§ 3730(e)(4) "permits only [an] insider/'whistleblower' to maintain the *qui tam* action"), *cert. denied*, 116 S. Ct. 915 (1996); *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1347 (4th Cir.) (1986 FCA amendments "sought to prevent 'parasitic' *qui tam* actions"), *cert. denied*, 115 S. Ct. 316 (1994); *Springfield Terminal*, 14 F.3d at 651 (1986 FCA amendments "left in place barriers to parasitic lawsuits"); *Stinson*, 944 F.2d at 1161 (§ 3730(e)(4) "insures that suits decried as copycat or parasitic . . . will not clog the courts").[17]

This interpretation of the "public disclosure" bar has the virtue of comporting with common sense. "*Qui tam* suits are meant to encourage insiders privy to a fraud on the Government to blow the whistle on the crime. In such a scheme, there is little point in rewarding a second toot." *Wang*

[17] Commentators, as well as courts, have underscored this point. *See, e.g.*, Vogel, *The Public Disclosure Bar Against Qui Tam Suits*, 24 Pub. Cont. L.J. 477, 510 (1995) ("[T]he final version of [§ 3730(e)(4)] bars purely parasitic relators from going forward under any circumstances."); Comment, *Qui Tam Suits Under the False Claims Amendments of 1986: The Need for Clear Legislative Expression*, 42 Cath. U. L. Rev. 935, 953 (1993) ("The . . . language [of § 3730(e)(4)] reflects congressional intent that parasitic suits should remain forbidden."); Oparil, *The Coming Impact of the Amended False Claims Act*, 22 Akron L. Rev. 525, 549 (1989) ("Clearly, the purpose of [§ 3730(e)(4)] was to retain the 1943 Amendment's bias against parasitic lawsuits.").

v. FMC Corp., 975 F.2d 1412, 1419 (9th Cir. 1992). At least where the Government has undertaken active steps to investigate particular allegations of wrongdoing, a "parasitic" action affirmatively *injures* the public fisc by diverting a portion of the potential recovery from the Government's coffers to a *qui tam* relator who by definition has added nothing of value. *See, e.g., Springfield Terminal*, 14 F.3d at 649 (noting that § 3730(e)(4) is designed to prevent "parasitic exploitation of the public coffers").

"Parasitic" actions, indeed, present all of the drawbacks of ordinary *qui tam* actions without the corresponding benefit of exposing fraud. In particular, they can jeopardize subsequent criminal proceedings. As Justice Jackson warned over half a century ago: "[T]he trial of a criminal case can be wrecked by pre-trial of the issues on the civil side of the court, particularly if the civil trial is conducted by those not interested in the criminal prosecution." *Marcus*, 317 U.S. at 560-61 (dissenting opinion). *See also id.* at 561 ("By trial, by taking of depositions, by other devices, the informer may force the premature disclosure of the Government's case."). And where, as here, the Government conducts a lengthy investigation into particular allegations of wrongdoing and turns up nothing, "parasitic" *qui tam* actions are nothing but an instrument of harassment used to extort a lucrative settlement.

Interpreting the FCA's "public disclosure" bar to preclude "parasitic" *qui tam* actions by members of the public also has the virtue of comporting with the canon that statutes phrased in virtually identical terms should be interpreted alike. *See, e.g., Northcross v. Board of Educ.*, 412 U.S. 427, 428 (1973) *(per curiam)*. In 1989, three years after enacting the "public disclosure" bar at issue here, Congress authorized the Attorney General to reward "whistleblowers" in criminal cases involving "major fraud" against the Government with cash payments of up to $250,000—except, *inter alia*, where "the furnished information is based upon public disclosure of allegations or transactions" by the Government or news media, unless the

informer is an "original source of the information." *See* 18 U.S.C. § 1031(g)(1), (2)(C). Here, as in the FCA, it is quite obvious that "public disclosure" does not require disclosure to the *general* public. It is unlikely, to say the least, that Congress intended to authorize payment of cash awards to "parasitic" informers.[18]

The legislative history of the 1986 FCA amendments also supports the commonsense conclusion that Congress did not intend to authorize "parasitic" *qui tam* actions. Indeed, the relevant Committee Reports are chock-full of statements reaffirming the FCA's traditional purpose of "encourag[ing] any individual knowing of Government fraud to bring that information forward." S. Rep. No. 345, 99th Cong., 2d Sess. 2 (1986). *See also* H.R. Rep. No. 660, 99th Cong., 2d Sess. 23 (1986) ("The purpose of the *qui tam* provisions of the False Claims Act is to encourage private individuals who are aware of fraud being perpetrated against the Government to bring such information forward.").

In particular, the legislative history underscores that the 1986 replacement of the "government knowledge" bar with the "public disclosure" bar was not intended to authorize "parasitic" *qui tam* actions. The relevant Committee Reports fault the 1943 "government knowledge" bar for having precluded *qui tam* actions involving alleged wrongdoing about which the Government had done *nothing* by way of

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[18] Other sections of the U.S. Code also refer to the public disclosure of information to *particular members* of the public rather than to the *general* public. *See, e.g.*, 8 U.S.C. § 1534(e)(1)(C), 50 U.S.C. § 1806(c) (Government need not disclose information obtained by electronic surveillance either to criminal defendant or court if such "public disclosure" would pose a risk to national security); 42 U.S.C. § 1396t(i)(5) ("The State shall provide for public disclosure of findings under this paragraph *upon request*") (emphasis added); *cf. GTE Sylvania*, 447 U.S. at 108-09 (disclosure to *any* member of the public under the Freedom of Information Act is "most accurately characterized as a 'public disclosure' within the plain meaning of [a provision of the Consumer Product Safety Act]").

investigation or disclosure. "The Committee recognizes the validity of the reasons for enactment of the 1943 amendments. Nevertheless, the Committee is concerned that there are instances in which the Government knew of the information that was the basis of the *qui tam* suit, but in which the Government took *no action*." H.R. Rep. No. 660 at 22-23 (emphasis added). *See also* S. Rep. No. 345 at 12-13 ("Courts have also found the jurisdictional bar to apply even if the Government makes *no effort* to investigate or take action after the original allegations were received.") (citing *United States ex rel. Lapin v. International Business Machines Corp.*, 490 F. Supp. 244 (D. Haw. 1980)) (emphasis added). Congress addressed this concern in 1986 by limiting the bar to situations in which the Government disclosed the information in a manner that established that it had not abdicated its law-enforcement responsibilities.[19]

B. The Ninth Circuit Erred by Holding that the FCA Authorizes "Parasitic" *Qui Tam* Actions by a Government Contractor's "Innocent Employees."

It follows from the foregoing that the Ninth Circuit erred by holding that the amended version of § 3730 authorizes "innocent employees" of government contractors to file "parasitic" *qui tam* actions based on allegations or transactions disclosed in a government audit or investigation. *See* Pet. App. at 8a-11a. The Ninth Circuit did not deny that such employees are members of the "public," nor did it otherwise seek to ground its holding in the text of the statute. Rather, the court

[19] The legislative history of the 1986 FCA amendments may be most notable for what it does *not* say. Nowhere in that extensive history is there any suggestion that Congress sought to overturn the bedrock distinction between "whistleblowers" and "parasites." It is unlikely, to say the least, that Congress would have altered the statutory scheme in such a fundamental (and counter-intuitive) manner without any explanation or explicit recognition. *See, e.g.*, *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 284 n.13 (1974) ("If Congress intended a result so drastic, it is not unreasonable to expect that it would have said so expressly.").

explicitly based its interpretation of § 3730 on *policy* grounds. According to the Ninth Circuit, it is "unrealistic" to expect "innocent employees" to bring *qui tam* actions against their employers (or, for that matter, *other* government contractors), and thus a government disclosure to such employees "does not trigger the potential for corrective action presented by other forms of disclosure." *Id.* at 9a. That argument has no basis in law or fact, and reveals a fundamental misunderstanding of the statute.

The FCA authorizes private parties to bring *qui tam* actions for the very *purpose* of encouraging insiders to expose fraud that would otherwise go undetected. Far from being "unrealistic" *qui tam* plaintiffs, Pet. App. at 9a, the employees of government contractors are in fact the "paradigm" relators. *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740, 742 (9th Cir. 1995) *(en banc)*, *cert. denied*, 116 S. Ct. 1877 (1996); *Wang*, 975 F.2d at 1419; *cf.* Boese, *Civil False Claims*, at 4-9 ("The most common *qui tam* plaintiff is the current employee."); *id.* at 4-10 ("The second most common *qui tam* plaintiff is the former employee."). Indeed, that is why the FCA's *qui tam* provisions afford comprehensive protection for "whistleblowing" employees. *See* 31 U.S.C. § 3730(h).[20] Members of the general public simply do not have the inside knowledge necessary to expose fraud by government contractors. Accordingly, the Ninth Circuit's core assumption—that an innocent employee is unlikely to bring a *qui tam* action for fear "that her job may be in jeopardy," Pet. App. at 9a—is not only speculative but fanciful.

In any event, the government investigation and audits in this case were disclosed not only to *Hughes'* employees, but also to

[20] "Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under [the FCA] . . . shall be entitled to all relief necessary to make the employee whole."

Northrop's. *See, e.g.*, J.A. at 30. The Ninth Circuit breezily dismissed that point by asserting that all defense contractors and their employees "operate within a closed loop of secrecy." Pet. App. at 9a. This assertion too is baseless: Even if employees were chilled from blowing the whistle on their *own* employers, there is no reason to suppose that they would be chilled from blowing the whistle on *other* employers. To the contrary, prime contractors have a strong financial incentive to ensure that their subcontractors do not overcharge. Indeed, in this very case, it was Northrop employees who launched the government investigation of Hughes' accounting practices. *See* J.A. at 20-22.

The Ninth Circuit also expressed a belief that "curtail[ing] the ability of insiders to bring suit once the government becomes involved in the matter," Pet. App. at 10a, would be "contrary to the intent of the statute," *id.* at 11a. Not so. The court flatly ignored the FCA's fundamental distinction between "whistleblowers" and "parasites." "A whistleblower sounds the alarm; he does not echo it." *Wang*, 975 F.2d at 1419. The FCA seeks to encourage insiders to bring suit *before* the Government takes affirmative steps to investigate or prosecute a particular allegation of wrongdoing. An insider who files an action based on allegations disclosed in the course of a government audit or investigation is precisely the kind of opportunistic relator whom the "public disclosure" bar sought to keep out of court.

The Ninth Circuit's interpretation of the statute, moreover, has staggering practical implications. The Government routinely audits its contractors and investigates potential contract irregularities. Such audits and investigations almost invariably require contact between government personnel and a contractor's employees. Under the Ninth Circuit's rule, such employees are always free to file *qui tam* actions based on information thereby disclosed by the Government. The amounts of money at stake are often breathtaking (Schumer, for instance, sought *$150 million* in this case), and the FCA

provides the employee with ironclad protection against retaliation. Needless to say, the temptation to file *qui tam* suits is particularly strong among employees who are otherwise disgruntled (Schumer, for instance, had been passed over for promotion months *before* he filed this action). Thus, if the Ninth Circuit's rule is upheld, every government audit or investigation can be expected to spin off its own "parasitic" *qui tam* action.[21] Random employees (and their lawyers) may thereby become rich, but only by diverting money from the public fisc.

It is, of course, possible for Congress to enact laws that defy common sense in this manner. This Court, however, should not lightly presume that Congress has done so. *See, e.g., Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527-28 (1989) (Scalia, J., concurring); Breyer, *Justice Lester W. Roth Lecture*, 65 S. Cal. L. Rev. 845, 848 (1992) (statutes should not be construed in a manner "manifestly contrary to common reason"). Accordingly, the Ninth Circuit's implausible interpretation of § 3730 should be rejected.

III. A "FALSE CLAIM" UNDER THE FCA MUST BE CAPABLE OF INJURING THE PUBLIC FISC.

Perhaps the most startling aspect of the decision below is the Ninth Circuit's conclusion that Schumer was entitled to a trial on the merits under the FCA based solely on his challenge to the adequacy of Hughes' *disclosure* of its accounting practices to the Government and Northrop. *See* Pet. App. at 19a-20a, 25a-26a. Schumer's challenge to the underlying accounting practices, the court acknowledged, did not present any genuine

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[21] The Ninth Circuit acknowledged this possibility, but shrugged it off on the ground that a contractor would face only "a single lawsuit in each instance, since the first filing would constitute public disclosure sufficient to bar other claims based upon the audit." Pet. App. at 11a. That observation, of course, offers scant reassurance to government contractors, and simply encourages a race to the courthouse among opportunistic employees hoping to capitalize on adverse government findings.

issue of material fact; commonality accounting is not only proper, but in this case actually *saved* the Government money. *See* Pet. App. at 15a-19a (holding that the allocation of one-half of the ASC development costs to the B-2 program was proper); *id.* at 21a-22a (holding that Schumer "provide[d] no authority" for his contention that Hughes' division of common RDP upgrade costs between the B-2 and F-15 projects was improper); *id.* at 4a (acknowledging that Hughes' accounting methods saved the Government money). The court declared, however, that a wholly technical noncompliance with accounting disclosure regulations can nonetheless give rise to liability under the FCA. "[T]he lack of a determination of actual harm [from the disclosure deficiencies] does not preclude a claim under the FCA." *Id.* at 25a.

The Ninth Circuit thereby revealed a fundamental misunderstanding of the FCA's substantive scope. The statute, as its name suggests, proscribes *false claims* against the Government. It is not a code of procedural regularity in government contracting. It does not create an all-purpose cause of action for the violation of any statute or regulation. Unless an FCA plaintiff (either a *qui tam* relator or the Government) can identify a "claim" for government money that is "false," there is simply no cause of action under the statute. Because the purely technical noncompliance with accounting disclosure regulations at issue here did not relieve the Government of its obligation to pay any claim, it cannot, as a matter of law, give rise to FCA liability.

A. The FCA Proscribes Pecuniary Frauds Against the Public Fisc.

The FCA defines a "claim," in relevant part, as a "request or demand, whether under a contract or otherwise, for money or property." 31 U.S.C. § 3729(c). That definition comports with the term's ordinary meaning: a "claim" is commonly understood as "a demand for compensation, benefits, or payment." Webster's Third New International Dictionary 414 (1976). *Accord United States v. McNinch*, 356 U.S. 595, 599 (1958);

United States v. American Heart Research Found., Inc., 996 F.2d 7, 9-10 (1st Cir. 1993). A false claim, thus, necessarily entails a request for money or property to which the claimant is not entitled.

The FCA's focus on "claims" reflects its fundamental purpose of "protect[ing] the treasury against the hungry and unscrupulous host that encompasses it on every side." *United States v. Griswold*, 24 F. 361, 366 (D. Or. 1885). *See also Rainwater v. United States*, 356 U.S. 590, 592 (1958) ("It seems quite clear that the objective of Congress was broadly to protect the funds and property of the Government."); *McNinch*, 356 U.S. at 599 (FCA designed to halt "plundering of the public treasury"). The statute does not target any and all transgressions by a government contractor. Rather, it targets a specific type of transgression: the submission of an inflated request for payment. *See, e.g., United States v. Halper*, 490 U.S. 435, 444 (1989) (FCA "designed to 'protect the government from financial loss'—rather than to 'vindicate public justice'") (quoting *Marcus*, 317 U.S. at 548-49). To establish liability under the FCA, the Government (or a *qui tam* relator) must at the very least allege and prove that a particular transgression resulted in an excessive demand for government money. "The statute imposes liability only for the commission of acts which cause false claims to be presented." *United States v. Bornstein*, 423 U.S. 303, 312 (1976).[22]

It necessarily follows that where, as here, an alleged infraction does not have the effect of inflating any claim against the public fisc, it is beyond the FCA's scope. "[T]he allegedly false claim must be one that is capable of causing an injury to the funds or property of the United States." *United States v. Azzarelli Constr. Co.*, 647 F.2d 757, 759 (7th Cir. 1981). *See also Peterson v. Weinberger*, 508 F.2d 45, 52 (5th Cir.) ("A claim is within the purview of the False Claims Act

[22] The FCA's location in Title 31 of the U.S. Code ("Money and Finance") further underscores its focus on protection of the public fisc.

if it is grounded in fraud which might result in financial loss to the Government."), *cert. denied*, 423 U.S. 830 (1975). A breach of contract, or a statutory or regulatory violation by a government contractor, does not necessarily result in a "false claim," and thus does not *per se* give rise to an FCA cause of action.

That is not to say that government contractors are free to ignore their legal obligations as long as they are careful not to submit any false claims. To the contrary, contractors may face liability under their contracts or a specific statute or regulation governing their conduct. They might even face liability under a general anti-fraud statute. But a contractor cannot be held liable under the *FCA* unless the Government (or a *qui tam* relator) establishes that it knowingly submitted a false claim for payment or approval. The FCA, in short, "was not designed to reach every kind of fraud practiced on the Government." *McNinch*, 356 U.S. at 599. *See also United States v. Cohn*, 270 U.S. 339, 345-47 (1926) (FCA does not prohibit fraudulent obtaining of property from the Government in its capacity as bailee, because the public fisc does not suffer any "pecuniary or property loss"); *United States ex rel. Glass v. Medtronic, Inc.*, 957 F.2d 605, 608 (8th Cir. 1992) (alleged violation of medical device reporting requirement incapable of establishing a "false claim"). "[I]f Congress had intended to prohibit all intentional deceit of the Federal Government, it would have used [broader] language." *United States v. Yermian*, 468 U.S. 63, 71 (1984).

Were the law otherwise, the FCA would swallow up a large chunk of both contract law and the U.S. Code. In particular, the FCA would subsume the False Statements Act ("FSA"), 18 U.S.C. § 1001, which proscribes making false statements to the Government. As this Court recently emphasized, not every false statement gives rise to a false claim. *See Hubbard v. United States*, 115 S. Ct. 1754, 1760 (1995). Because the FCA is "limited to false statements *intended to bilk the Government out of money or property*," it is "far narrower" than the FSA.

Id. (emphasis added); *see also United States v. Grainger*, 346 U.S. 235, 242-43 (1953). A false statement incapable of causing injury to the public fisc, in other words, may be actionable under the FSA, but not the FCA.[23]

Confining the FCA to its proper realm has especially significant practical implications in light of the statute's extraordinary *qui tam* enforcement mechanism. The FCA represents a notable exception to the general rule that the Executive Branch enforces the laws of the United States on behalf and in the name of the United States. Under virtually every other statute, an injury to the United States can be redressed only by the United States. To the extent the FCA is construed to authorize *qui tam* actions to enforce the statutory and regulatory rights of the United States across the board,[24] it subverts Congress' policy choice concerning the appropriate enforcement of federal law.

Finally, it is important to bear in mind that the substantive scope of the civil FCA, 31 U.S.C. § 3729, is in relevant part materially identical to the substantive scope of the criminal FCA, 18 U.S.C. § 287. Thus, the scope of the civil provisions "'must be carefully restricted, not only to their literal terms but to the evident purpose of Congress in using those terms.'" *Bornstein*, 423 U.S. at 313 n.8 (quoting *McNinch*, 356 U.S. at 598); *cf. United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-518 (1992) (plurality opinion) (rule of lenity applies to civil provisions with criminal applications); *id.* at 519 (Scalia, J., concurring in judgment) (same). Although it is hardly necessary to invoke the rule of lenity to conclude that a

[23] Indeed, the cover page of the CAS disclosure provisions at issue here stated in no uncertain terms: "THE PENALTY FOR MAKING A FALSE STATEMENT IN THIS DISCLOSURE IS PRESCRIBED IN 18 U.S.C. 1001." J.A. at 17.

[24] *See, e.g., United States ex rel. Fine v. Sandia*, 70 F.3d 568, 572 (10th Cir. 1995) ("The FCA, with its *qui tam* provision, is a means to pursue a remedy for violations of other statutory provisions, here the [Nuclear Waste Policy Act].").

"false claim" requires something more than technical noncompliance with a disclosure regulation, that venerable rule highlights the impropriety of casually converting the FCA into an all-purpose code of procedural regularity.

B. An Inadequate Disclosure of Accounting Practices Cannot *Per Se* Give Rise To FCA Liability.

The Ninth Circuit expressly acknowledged that Hughes' commonality accounting practices were proper and did not result in any request for payment to which Hughes was not entitled. *See* Pet. App. at 4a, 25a. It necessarily follows that any inadequacy in Hughes' *disclosure* of those accounting practices to the Government and Northrop could not have resulted in any improper request for payment. Accordingly, any disclosure inadequacy could not have resulted in a "false claim," and this case should have been dismissed outright. Instead, the Ninth Circuit held that "the lack of a determination of actual harm [from an allegedly improper disclosure] does not preclude a claim under the FCA." *Id.* at 25a. The court thereby ratified the misguided view that the FCA proscribes any and all statutory or regulatory infractions by a government contractor.

In support of that remarkable holding, the Ninth Circuit cited *Rex Trailer Co. v. United States*, 350 U.S. 148, 152 (1956). *See* Pet. App. at 25a. That case, however, is not remotely on point. *Rex Trailer* held only that the Government was not required to prove "specific damages" to recover a statutory penalty for fraud. *See* 350 U.S. at 152-53. The FCA's statutory penalty provision, the *Rex Trailer* Court noted, operates like a "liquidated-damage provisio[n] which fix[es] compensation for anticipated loss" when "damages are uncertain in nature or amount or are unmeasurable." *Id.* at 153. The fact that proof of specific damages is unnecessary to establish liability under the FCA, however, in no way suggests that the possibility of injury to the public fisc is unnecessary to establish such liability. As the Seventh Circuit has explained, "[t]he lack of any requirement of specific evidence of *damages*

does not dispense with the need to establish an *injury*." *Azzarelli*, 647 F.2d at 762 (emphasis added) (citing *Rex Trailer*, 350 U.S. at 152-53).

Hughes' alleged noncompliance with its accounting disclosure obligations does not create a genuine issue of material fact under the FCA for the simple reason that any such noncompliance was incapable of resulting in any injury to the public fisc.[25] If, as the Ninth Circuit acknowledged, Hughes' underlying accounting practices were entirely proper and actually *saved* the Government money, then *a fortiori* any inadequate *disclosure* of those practices could not have resulted in a "false claim." The immaterial disclosure deficiencies alleged here do not present a genuine issue of material fact under the FCA, in short, because they did not lead Hughes to request a single penny from the Government to which the company was not entitled. *See* Pet. App. at 67a-68a; J.A. at 144-45; *cf. United States v. Data Translation, Inc.*, 984 F.2d 1256, 1267 (1st Cir. 1992) (affirming dismissal of FCA claim because the "alleged nondisclosure could not have been material to the price negotiated") (Breyer, J.); *Brunswick Bank & Trust Co. v. United States*, 707 F.2d 1355, 1365 (Fed. Cir. 1983) (no FCA violation where alleged misrepresentation would not affect Government's obligation to pay under contract).[26]

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[25] It is far from clear whether Hughes' delay in formally submitting a revised CAS disclosure statement even amounts to a violation of its disclosure obligations. Notwithstanding that delay, the Government was aware at all times that Hughes was developing common parts for the B-2 and F-15 aircraft, *see supra* p. 6, and that Hughes previously had used commonality agreements to allocate costs, *see* Pet. App. at 39a-40a.

[26] The Ninth Circuit suggested that the alleged defects in Hughes' disclosure of its accounting practices to Northrop and the Government "may" have rendered unspecified costs "unallowable" within the meaning of a federal regulation. Pet. App. at 19a, 25a (citing 48 C.F.R. § 31.201-2(a)(3)). That suggestion is baseless as a matter of fact and law. Following a lengthy investigation, the Government's Contracting Officer determined

(continued...)

C. New Allegations Raised in a Brief in Opposition to Summary Judgment Need Not Be Treated as *De Facto* Amendments to a Complaint.

The Ninth Circuit erred not only by holding that Schumer was entitled to a trial based on his allegation of inadequate disclosure to the Government, but even by addressing that allegation in the first place. The court freely acknowledged that Schumer had first presented this allegation in his brief in opposition to summary judgment, *see* Pet. App. at 22a, but held that the District Court had erred by not treating the new allegation as a *de facto* amendment of the complaint, *see id.* at 22a-23a.

That holding makes no sense. The procedures governing the amendment of a complaint are set forth in Fed. R. Civ. P. 15. Under that rule, the decision whether to permit a plaintiff to add new allegations to a complaint is within a district court's *discretion*. *See, e.g.*, *Foman v. Davis*, 371 U.S. 178, 182 (1962). The Ninth Circuit's rule thus leads to the anomalous result that a district court has discretion to deny a formal motion to amend a complaint under Rule 15, but no such discretion to deny a *de facto* amendment when a plaintiff

(...continued)
that Hughes' commonality accounting practices complied with applicable regulations, that any nondisclosures were immaterial, and that no adjustment to the contract price should be made. *See* Pet. App. at 67a-68a. Accordingly, the Government paid Hughes the $15.4 million that had been withheld during the course of the investigation. Under black-letter government-contracts law, "a determination by a contracting officer that a cost is allowable, combined with payment of that cost, binds the Government so that no challenge to the allowability of the cost can be maintained." J. Cibinic & R. Nash, *Cost-Reimbursement Contracting* 1106 (2d ed. 1993) (citing cases). Thus, Schumer failed to present any "genuine issue of material fact" regarding any "unallowable" cost, much less any "genuine issue of material fact" regarding any FCA violation.

simply raises a new claim in a brief in opposition to summary judgment.[27]

The Ninth Circuit's rule of mandatory *de facto* amendment also subverts the core purpose of a complaint: to put the defendant and the court on notice of the plaintiff's claims. *See, e.g.*, *Pritchard v. Rainfair, Inc.*, 945 F.2d 185, 191 (7th Cir. 1991) ("The defendant and the court should not be left to speculate as to what theory the plaintiff may be pursuing."). Such notice is particularly important where, as in FCA cases, allegations of fraud are involved. *See, e.g.*, *Gold v. Morrison-Knudsen Co.*, 68 F.3d 1475, 1476-77 (2d Cir. 1995) *(per curiam)* (FCA complaints must be pleaded "with particularity" pursuant to Fed. R. Civ. P. 9(b)), *cert. denied*, 116 S. Ct. 1836 (1996). The summary judgment process will not work if a plaintiff's allegations are an ever-moving target. *See, e.g.*, *Pritchard*, 945 F.2d at 191 ("[An] attempt to amend [a] complaint by briefs in opposition to summary judgment . . . is both untimely and improper."). Litigation should not be a ceaseless game of cat-and-mouse.[28]

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

[27] That anomaly is manifest *in this very case*, as the Ninth Circuit proceeded to *affirm* the District Court's denial of Schumer's formal Rule 15 motion to amend his complaint in light of his "undue delay." Pet. App. at 28a-29a. Schumer did not present the new allegations in his brief in opposition to summary judgment until more than three weeks *after* his unduly dilatory Rule 15 motion. *See* J.A. at 7-8.

[28] The Ninth Circuit's erroneous holding on *de facto* amendment relates only to Schumer's challenge to the adequacy of Hughes' disclosure to the *Government*, *see* Pet. App. at 22a-26a, not to his challenge to the adequacy of Hughes' disclosure to *Northrop*, *see id.* at 19a-22a.

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